

A N
E X A M I N A T I O N
I N T O T H E
R I G H T S A N D D U T I E S
O F
J U R O R S, &c.

[Illegible text]

A 2

EXAMINATION

INTO THE

RIGHTS AND DUTIES

OF

JURORS

[REDACTED]

5
UK
993
EXA

✓
G3382

Rec. Jan. 17, 1899.

~~Handwritten scribble~~

A N
E X A M I N A T I O N
I N T O T H E
R I G H T S A N D D U T I E S
O F
J U R O R S, &c.

I N T R O D U C T I O N.

THE general and well-grounded complaint, which is daily urged against the increasing bulk of our legal writings, the *tam immensus aliarum super alias acervatarum legum cumulus*, so like that of which Livy complained, seems to demand, at least, that when any one obtrudes his sentiments upon a question of law on the public, he ought to assign some very reasonable cause for increasing an evil that

B calls

calls so loudly for remedy : but, when an unlucky author presumes to oppose the general voice ; when the doctrines which he is to enforce carry an air of novelty in their appearance, though the principles upon which they are founded be as ancient as the very foundation of our constitution, where shall he find an excuse for daring to assert opinions, which he knows will be decried, or to advance facts or reasoning in the teeth of prejudice and error ? Exactly in this dilemma does the writer of the following sheets find himself. But he feels a confident security in the truth of those principles, which it is the business of this tract to assert and defend ; and he consoles for the disapprobation which he is aware they will meet with, in the reflection, that in writing what he here offers to the public, he was stimulated solely by a conviction of its foundation in truth, law, and reason, and a wish to throw a clearer light upon a subject involved

volved in obscurities, and perplexed with
 contradictions ; that while, on the one
 hand, he has studiously avoided a servile
 surrender of our dearest rights to the mi-
 nisters of arbitrary power, he has, on the
 other, as cautiously declined to adopt those
 pernicious tenets, which, if the madness
 of the times were ripe to give them head,
 would reduce the most admirable system of
 jurisprudence in the world to worse than
 primitive imperfection ; since in the most
 important concerns of life, our properties
 and our being, might with equal ease be
 wrested from us, not according to any
 settled rules, but as the passions or preju-
 dices of men should pervert their judge-
 ment, and misconception or ignorance de-
 ceive their understandings in forming an
 abstract opinion in matters with which it
 is nearly impossible they could be suffi-
 ciently acquainted.

THAT he does not fall into the first extreme, will not, he believes, gain him any extraordinary degree of credit, at a time when arbitrary power exists in this country only in the gloomy imagination of the restless republican. That he avoids the other, will, he is well assured, gain him, from the greater part of the world, no credit at all, at a time when it is the fashion to exalt the power of jurors beyond all law and reason; to brand those who think that both reason and law concur in setting limits to their jurisdiction, as the time-serving tools of arbitrary power; and to charge every judge or lawyer, who is willing to 'render unto Cæsar the things that are Cæsar's,' with a design to overturn or undermine the liberties of his country.

It will scarcely be necessary to inform the reader, that this work was undertaken in consequence of the variety of opinions which

which has of late years distracted the world, with regard to the power of jurors in matters of libel ; however, had those controversies been maintained without striking at the rights and duties of the judges in every other instance, the author doubts whether he should have entered upon the disquisition : but as the doctrines lately broached in matters of libel, if they work any effect, must overturn the whole system of our legal polity ; as the rules which have been laid down in support of those doctrines, equally affect the powers of the judges and jurors in every other case, it seems necessary to take a more general view of the subject, and to recur a little farther back in our history than the trial of the seven bishops ; it seems necessary to appeal rather to times of peace and order, than to those unhappy periods at which our laws and liberties groaned under the violations of kingly power, or the rage of anarchy ; and, since there is still such difference of

opinions

opinions on the powers of jurors in one instance, to try that case by the reason of those rules which the law has applied to all other cases. As far as it comes within that reason, so far we may conclude it ought to be directed by those rules.

WHILE the author is necessarily obliged to controvert many of those positions which have been advanced in support of that favourite *decantatum*, that juries are to judge on their own knowledge, of the law as well as the fact, he begs leave here to profess, that not one, even its most sanguine admirer, has a higher veneration for trial by jury than himself; not one would more cheerfully contribute his labours or his fortune in defence of a mode of trial, to the excellence of which, so long a succession of ages has borne the most honourable testimony; a mode of trial, which, to comprize its inestimable value in as few words as it will admit,

may,

may, according to the opinion of a late respectable writer, be truly called, 'the very best criterion for investigating the truth of facts that ever was established in any country.' But with all this admiration of trial by jury, he thinks it sufficient to consider it merely as a criterion for investigating facts, and expects to be able to prove, that it was never intended by the constitution for any other purpose, however modern theoretical writers have deceived themselves, and misled their readers into a contrary opinion. He thinks that the wisdom of our constitution did not ordain that twelve judges should be chosen for their learning and probity, merely to keep order among a jury, and learn that law, in the practice of which their lives had been spent, from John Lilburne and Michael Rayner. How far he has succeeded in his undertaking, it is not

* Blackstone's Commentaries, vol. III. p. 385, 8th edit.

for him to say. The Public, from whom the only indulgence he claims is a patient hearing, will be the best judges, whether he, or those whose sentiments he has occasion to oppose, have most strictly adhered to truth. He says occasion ; for surely when we see the powers of jurors disputed, not between judges and them, (for to the honour of the latter be it said, the instances of their resisting the direction of the judge in matters of law are very rare) but, between lawyers at the bar and in their writings ; when we see this position, that juries are to judge all the criminality of a libel, as well as the truth of the fact of publication, supported, not by arguments drawn from the peculiarity of the case, which may require an exception to the general rule, but by general assertions, that jurors are complete and uncontrollable judges of the law in every instance, it is time for every honest man to oppose an innovation of the most dangerous tendency.

deney. 'Every man,' says a strenuous advocate for what he thinks the *right* of jurymen, 'who is liable to serve on juries, should endeavour, as far as his other avocations will admit, to make himself master of the duties of this important office.' It is certainly most true, and therefore most true also, that a mistake or mistatement of the rights and duties of that office may, if not corrected, occasion innumerable evils, by the perversion of reason, and the hindrance of justice.

WITH a view to this correction, the writer of the following sheets lays them before the Public; and he will be fully compensated for his time and pains, if, while he combats positions, futile and absurd, he can clear the ground a little for

² Doctor Towers' Observations on the Rights and Duties of Jurors. See preface, p. 7.

some great master of jurisprudence, who, undazzled by the glare of opinion, and unobstructed by the stumbling blocks of precedents, shall raise and perfect the superstructure.

SEC.

If the advocate for an unlimited power is pressed to decide questions of law on their own knowledge, and not contented to rest upon the reason of their cause, the refutation of their hypothesis would scarcely be worth a responsible man's time; but knowing this to be an unsafe support, they have ventured upon another, which, though on a superficial view it may appear formidable, will not stand the test of examination: this is the authority of precedents, and the writings of lawyers. And possibly it will here be asked, who is it that these authorities possess, derived from so sacred a source? Does he derive the weight of character, or the influence of power, to support his doctrine? It has been already observed

SECTION THE FIRST.

IF the advocates for an unlimited power in juries, to decide questions of law on their own knowledge, had been contented to rest upon the reason of their cause, the refutation of their hypothesis would scarcely be worth a reasonable man's time : but knowing this to be an unsafe support, they have ventured upon another, which, though on a superficial view it may appear plausible, will not stand the test of examination ; this is the authority of precedents, and the writings of lawyers. And possibly it will here be asked, who is it that thus attacks positions, derived from so sacred a source ? Does he bring the weight of character, or the influence of power, to support his doctrines ? It has been already

observed by a writer, whose researches have contributed, in a considerable degree, to the advancement of juridical and historical knowledge, that ‘ the undue influence of what are called great authorities, gives a stab to the spirit of inquiry in all sciences.’ How much more baneful, then, must be the influence of their perversion or abuse ! It is from them that we are to glean all the learning of the common law, and they are therefore entitled to our respect, as well as attention : but it would be a strange mark of regard, tacitly to acquiesce in that abuse of their meaning which we daily witness. Men, hurried by the opposition of contending opinions, have, like the jaundiced eye, seen every thing of the same hue, and fallen into the most palpable absurdities. Thus they will not see that the arguments which they use to support the doctrine, that ju-

3 Doctor Stuart's View of Society in Europe.

pers are competent to decide on the law in matters of libel, make just as strongly on a question of simony, or a contingent remainder; not because they are analogous, but because those arguments are, indeed, deduced from a supposed pre-established position, that juries are *in all cases* whatsoever competent to decide the law on their own knowledge, and therefore, of course, in matters of libel: while he, who advances those precious doctrines, and indulges all the exultation of anticipated triumph over *the glorious uncertainty of the law*, leaves his foresight and prudence to revolve at leisure, how he would like to see his benefice, or his remainder, disposed of by twelve men, the generality of whom have been precluded by their avocations from the study of any book on the subject.

It were well if many a writer would see that the very same authority from which
 he

he so elaborately retails the doctrine, that a jury may bring in a general verdict, in which the law is decided as well as the fact, will tell him in the same page, that it is the business of the judge to expound the law to them, and that if they will obstinately bring in a false verdict, they may be attainted. ' But they may bring in a false verdict if they please, and it shall be received, and be conclusive : ' Granted, that they may bring in a false verdict *and be attainted*, and that their verdict, true or false, must be received, and will be conclusive *unless the Court grant a new trial, which is every day's practice*. I may forge a note or a bond, which is received, and transferred, and detected, and I shall be hanged. Does the acceptance of this bond or note make it a valid security ? Or will the hanging be no proof that I have done a criminal act ?

THE

THE uncertainty of the law has been so long the topic of virulent invective, and the refuge of chagrin and disappointment, to the unsuccessful ; so long the standing theme of wit and good humour, to the social, that I should rather leave men's opinions as I found them on the subject, than attempt seriously to refute it. But the serious charges urged in print against the professors of that science in general, as the tools of a prerogative raised upon the ruins of our liberties, will plead my excuse for offering to the reader the opinion of Sir William Blackstone upon the subject. ' It hath sometimes,' says he, ' been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions, which occasion, it is alledged, abundance of rules that militate and thwart with each other, as the sentiments of successive legislators and judges have happened to vary. The fact of multiplicity is allowed, and that thereby

• thereby the researches of the student are
 • rendered more difficult and laborious;
 • but that with proper industry, the result
 • of those inquiries will be doubt and in-
 • decision, is a consequence that cannot be
 • admitted. People are apt to be angry at
 • the want of simplicity in our laws; they
 • mistake variety for confusion, and com-
 • plicated cases for contradictory. They
 • bring us the example of arbitrary go-
 • vernments, of Denmark, Muscovy, and
 • Russia; of wild and uncultivated nations,
 • the savages of Africa and America; or
 • of narrow domestic republics, in ancient
 • Greece or modern Switzerland, and un-
 • reasonably require the same paucity of
 • laws, the same conciseness of practice
 • in a nation of freemen, a polite and com-
 • mercial people, and a populous extent of
 • territory*.

• Black. Com. Book III. p. 325.

• But,

‘ BUT,’ continues this masterly writer,
 ‘ is not, it may be asked, the multitude
 ‘ of lawfuits, which we daily see and expe-
 ‘ rience, an argument against the clear-
 ‘ ness and certainty of the law itself? By
 ‘ no means; for among the various dis-
 ‘ putes and controversies which are daily
 ‘ to be met with in the course of legal
 ‘ proceedings, it is obvious to observe how
 ‘ very few arise from obscurity in the rules
 ‘ or maxims of law. An action shall sel-
 ‘ dom be heard of to determine a question
 ‘ of inheritance, unless the fact of descent
 ‘ be proved.’

‘ IN England,’ says Montesquieu, ‘ the
 ‘ jury give their verdict, whether the fact
 ‘ brought under their cognizance be proved
 ‘ or not. If it be proved, the judge pro-
 ‘ nounces the punishment inflicted by the

s Black. Com. Book III. p. 328, 329.

D

‘ law,

‘law, and for this he has only to open
‘his eyes.’

MODERN theorists, however, are not satisfied with this equitable distribution of power, but insist, that juries are invested with a jurisdiction over the law, independent on courts of law, and superior to their control.

‘As the main object of the institution
‘of trial by jury is,’ says Mr. De Lolme,
‘to guard accused persons against all decisions
‘whatsoever by men invested with
‘any permanent official authority, it is
‘not only a settled principle, that the opinion
‘which the judge delivers has no
‘weight but such as the jury choose to
‘give it, but their verdict must besides
‘comprehend the whole matter in trial,
‘and decide as well upon the fact, as

‘Spirit of Laws. Vol. I. p. 109.

‘upon

‘ upon the point of law that may arise
‘ out of it.’

‘ IN trials for murder,’ says Doctor
Towers, ‘ it is a point of law, whether
‘ the act by which the person was killed
‘ be murder, or manslaughter, or chance
‘ medley, or self defence ; but this point
‘ of law is almost always finally deter-
‘ mined by the jury. In such cases the
‘ judge explains to the jury the several
‘ kinds of homicide, and may give them
‘ his opinion under what denomination
‘ the particular act comes which is the
‘ subject of their inquiry : but they are
‘ not obliged to adopt his opinion⁷.’

RESPECTING the truth of ‘ this point
‘ of law being almost always finally deter-
‘ mined by the jury,’ it is sufficient here

⁷ Constitution of England, 3d edit. p. 176.

⁸ Observat. p. 21.

to observe, that the reader will find it answered hereafter. Let us for the present take it as proved, and listen to those gentlemen on the same exclusive right of juries in civil causes. ‘ In fine,’ says Mr. De Lolme, ‘ such is the nature of this ‘ happy institution, that the judicial power, a power so formidable in itself, which ‘ is to dispose of the property, honour, ‘ and life of individuals, and which, whatever precautions may be taken to restrain it, must in a great degree remain ‘ arbitrary, may be said in England to ‘ exist, to accomplish every intended end, ‘ and to be in the hands of nobody.’ And Doctor Towers takes no small share of pains to convince us, that ‘ a jury may ‘ bring in a general verdict in matters of ‘ property, in which the law in many ‘ cases is more intricate and obscure than ‘ in criminal cases’.

⁹ Confit. p. 184.

¹⁰ Observat. p. 21.

It is not with pleasure I am obliged to dissent from Mr. De Lolme, when he says, that 'to guard the accused against all decisions whatever of men invested with permanent, official authority, is the main object of this institution.' The depth of that gentleman's researches, the usual justness of his observations, and the philanthropy and spirit of liberty that breathe throughout his work, entitle him to the respect and affection of every Englishman. But no name however exalted, nor doctrine however generally received, ought to decide a man's opinions, against the dictates of his reason and the evidence of history. And this consideration will justify me for differing from so high an authority.

THE only object of this institution was the investigation of the truth of those facts which came to be controverted before a court of justice, and on which decisions of law

law were to be founded. While, for instance, the plaintiff alledged that he was the son, or other descendant or relation of a deceased person, and the defendant denied it, it was impossible for a judge to determine to whom the property in litigation belonged. The contradictory evidence of the opposite witnesses, instead of convincing, would most probably puzzle a judge who was a stranger to their characters. The most effectual method, therefore, of eviscerating the truth, was by a jury, who were acquainted with the parties and the witnesses, and necessarily the best judges of the degree of credit to which the evidence submitted to them was entitled. The case was similar in criminal accusations: and in both there were two points to be considered; the truth of the fact disputed, which always belonged to the jury, and the law arising upon that fact, which was invariably to be decided by the judge.

The

The spirit of opposition to the encroachments of power is of much later origin than the institution of juries. The institution has, indeed, been of infinite service in promoting that spirit, and will therefore continue, while a love of liberty characterizes the English people, to be one of the dearest objects to them. But it does not follow, because the mode of trial by jury justly merits the most zealous affection, that the decision of those laws which have been carefully handed down to us, and in the certainty of which, we find our chief security, ought to be submitted to the variable opinion of every jury. Difficulties far beyond the reach of any jurymen will daily arise in a rich and populous nation like this, where the personal rights of every individual are so various and important, and the rights of property so numerous and complicated.

How

How far, then, the rights of jurors extend, is the question in dispute. In the examination of it we shall consider,

First, the nature of the institution;

Secondly, The reason of the thing.

Thirdly, The constant practice of our courts of justice.

SIR William Temple and Bishop Nicholson¹¹ trace the custom of trial by jury as far back as the time of Odin, or Woden, the first leader of the Asiatic Goths, or Getæ, into Europe; and it is certain, that in England it was in use in the earliest periods of the Saxon government¹², actual mention being made of it in the laws of Athelred and his brother Alfred the Great, as a well-known mode of trial¹³. The last of these princes, among other improve-

¹¹ De Jure Saxonum.

¹² Bacon on Government, part I. page 57.

¹³ Wilkins's LL. Anglo Sax. 117.

ments of the laws, confirmed the custom of trial by jury in all criminal actions, in which the office of the jurors was to determine concerning the truth of the fact; and on this determination, or verdict, the judge was to pronounce the judgement of the law: and if in doing this he were influenced by favour or interest to the perversion of justice, he was punished with the most rigorous severity. Four and forty judges were put to death in one year by Alfred for their unjust decisions¹⁴.

Thus in the very earliest stages of this admirable institution, we find it limited to the investigation of facts only; we find judges appointed to administer the laws, and punish defaults in the ordinary rural judicatories; we find those judges restrained *dicere non dare legem*, and capitally punished for corrupt determinations. Does

¹⁴ Mirror, p. 239.

not this prove that their province was to decide the law ? For would it not be absurd to suppose, that the verdict of the jury was to be considered as the act of the judge, and that he was punished for their illegal decision ?

It is worth while here to contemplate the dangerous consequences that would result, from extending the power of jurors at this day to the cognizance of law questions. Indeed, at the time of which we treat, when arts and manufactures were, as yet, little known or cultivated ; when commerce was not understood nor studied, because it was not esteemed ; and the means of carrying it on were not brought to that degree of perfection, to which they have been since improved, there was little need of a multiplicity of commercial regulations. The boundaries of property were easily defined, when its descent was directed, and its possession transferred, by a few

few plain traditionary customs, unshackled by the long and intricate train of rules which now perplex its limitations, and will continue to do so as long as men ' clothe their intentions in dark or new-fangled expressions.' The written laws were so few, that the meanest capacity could understand them; and the universality of trial in the sheriff's court, which the freeholders were obliged to attend, gave the jurors so many opportunities of examining them, that it seldom happened, that the juryman was not almost as competent a judge of the law, as the bishop and alderman who presided over him. Notwithstanding all those circumstances, so much in favour of an unqualified right in juries to take cognizance of the law as well as the fact, we see, not only, that this right is not contended for, but the contrary very plainly asserted. With what face, then, shall we, in the eighteenth century, affirm that the power of juries ought to be aug-

mented, and that when a lawyer hardly obtains a thorough knowledge of his profession, *per lucubrationes viginti annorum*, every other rank and profession should be intuitively skilled in it?

IN the state which I have described, trial by jury remained until the Conquest; when, among the many great effects wrought upon our laws, language, and policy by that event, it was materially affected. The pleadings, instead of being carried on in the mother tongue, were conducted in law French, a language unknown to the people; and the judgments, instead of being formed on the old Saxon principle, were made to depend so much on the maxims and principles of the Norman jurisprudence, that law became a science, which fell, at first, entirely to the Normans, and which, even after it was communicated to the English, required so much study and application, that the laity

in

in those ignorant times were incapable of attaining it, and it was a mystery almost solely confined to the clergy; so that it became a maxim, *nullus clericus nisi causidicus*. As the freeholders were totally ignorant of the principles of the new law, the lawyers, who had now, differently from the Saxon times, become a separate profession, gradually brought all business before the king's courts¹⁵, and abandoned the ancient, simple, and popular judicature¹⁶.

It

¹⁵ Malmſbury, l. iv. p. 123.

¹⁶ Hume's Hist. Eng. Vol. II. 8vo. p. 123, 124.

It was the knowledge of this part of our history, that provoked John Lilburne, when on his trial for treason, to use that famous invective against the judges, which has been so much relied on as an incontrovertible authority, 'You that call yourselves judges of the law, are no more but Norman intruders, and indeed, and in truth, if the jury please, are no more but cyphers to pronounce their verdict.' If Doctor Towers¹⁷ in quoting this authority meant to insinuate, that the judges were intruders in all the instances of their jurisdiction, that is, that there were no judges

¹⁷ Observations, p. 19.

before

It is very easy to conceive how much this system must have reduced the consequence of trial by jury. It likewise received another violent blow by the introduction of trial by combat, which the superstition of the times readily adopted, and the oppressions of the Norman judges rendered preferable to their decisions; and by the time of King John, the disuse of juries had increased to such a degree, that we find the barons exacting from that un-

before the Conquest, we have answered him already from Andrew Horne; if he meant, that they were intruders in matters of libel, that is, that no such thing as libel was known before the Norman æra, we must set him right, now. In the laws of Alfred, cap. 28, and of Edgar, cap. 24, we find, ‘*Qui falsi rumores in vulgus sparsi, author fuisse, deprehendetur leviori aliqua pœna non mulctator, verum lingua ei prociditor, ni is eam integra capitis sui æstimatione, data redimerit.*’

And in the laws of Edgar and Canute, ‘*Si quis alium rumoribus dissipatis improba voce lacerarit, quamobrem aut corpori ejus damnum inferatura aut de fortunis imminuatur, tum fialter auditiones, tanquam falsas refellere et cœarguere poterit, aut is linguam data capitis æstimatione redimito, ei linguam prociditor.*’

toward

toward prince — *Nullus liber homo capietur vel imprisonetur vel disseisnatus de libero tenemento suo aut de liberis consuetudinibus suis, aut utlagetur aut alio aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*

THIS being the foundation upon which trial by jury still rests, it may be worth while to examine it a little more closely than those do, who seem to forget that such words as *per legem terræ* are to be found in it. Numerous instances daily occur of persons suffering the very extremity of those evils, against which this chapter of Magna Charta is said to provide, without the intervention of a jury, and solely by the law of the land. A man shall be taken and imprisoned on a *capias ad respondendum*¹⁸. If he absconds, and cannot be

¹⁸ Reports, p. 12.

found,

found, but is returned *quinto exactus*, he shall be outlawed; this outlawry is attended with a forfeiture of all his goods and chattels to the King; and a man's destruction is completed, when if he pleads guilty to an appeal of murder he shall be hanged¹⁹; and, not in any one of the cases which we have offered, is recourse had to trial by jury. In short, wherever the facts asserted by the plaintiff or prosecutor, are allowed by the defendant or prisoner, the *lex terre* will not suffer the absurd, and useless, delay of trial by jury, to find what is already admitted, but steps in with its judgement on the confession. Strange, then, that not only those that write professedly in support of one side of a question, with all the blindness of prejudice, but men²⁰ whose works will transmit their names with honour to posterity, should

De regimine militum, c. 1. de iur. et iust. c. 1. de iur. et iust. c. 1.

ibid. Forms de la Ley tit. Utlawry. *ibid.*

ibid. Mr. De Lolme, Justice Blackstone, &c.

adopt

adopt the opinion, that ‘ a subject of this kingdom cannot be affected in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals ;’ by which they would render the very idea of a court of justice unnecessary, and its judges an useless burden to the state. When, therefore, we find a lawyer, ‘ whose works will be admired as long as a good taste for literary compositions, or gratitude for the pleasure and instruction derived from them, shall have any influence,’ asserting the universality of trial by jury in the very terms quoted above, we should be obliged, either to limit the construction of his words, or confess they go to prove too much, had not himself furnished us with their proper illustration. In continuing his eulogy on juries, in the very same page, he asserts it to be one of the blessings of this mode of trial, ‘ that the power of judicature is not placed at random in the hands

of the multitude, whose decisions would
 naturally be wild and capricious, and
 would every day establish a new rule of
 action in our courts. It is wisely or-
 dered,' says he, ' that the principles and
 actions of law, which are general pro-
 positions, flowing from abstracted rea-
 son, and not accommodated to times or
 men, should be deposited in the breasts
 of the judges, to be occasionally applied
 by them to such facts as come properly
 ascertained before them".

WHEREIN, then, it may be asked, does
 this boasted excellence of trial by jury
 consist? Is it only in the unquestionable
 verity which it stamps on the proofs of a
 fact, on which the decision of law is to be
 given? Or is it in the power to interpret
 that law itself, and so by the wild and ca-
 pricious decisions which *opinion* should dic-

28 Black. Com. b. iii. p. 379.

tate, to establish this new rule of action every day? To make that intention amount to murder at Hereford, which should be manslaughter at Gloucester, according to the different ideas of two juries in those two places, of the malice necessary to make killing to be murder? To give an estate to the son at York, which should be adjudged to the uncle at Lincoln, to the brother at Norwich, to the nephew at Worcester, or the father at Warwick, because the juries of Warwick, and Worcester, and Norfolk, and Lincoln, and York entertained different opinions of the law of descents? There is no end to these questions; and there would be no end of the evils which we should suffer under a power so arbitrary and undefined²².

THE

²² One would think the Marquis of Beccaria was speaking of trial by jury as it is endeavoured to be established in England. 'We see,' says he, 'the same crimes punished in a different manner at different times by the same tribunals; the consequence

THE excellence of trial by jury, then, consists in this: that the allegations of no witness, or number of witnesses, shall authorise a judge to pronounce any fact, on the truth or falsity of which my property depends, to be sufficiently proved, and to give judgement thereon, unless it be palpably an object of sense, I allow it myself, or contending it, it appear evident beyond all doubt to twelve honest and impartial neighbours; that it shall not be in the power of any magistrate, however independent and upright, to determine whether I have done any act, or with what mind I have done that act, and so bring down the vengeance of the law upon me for a crime which I might never have committed, but that the fact, as well as the intention with which I did it, shall appear indisputable to a jury.

‘ of not having consulted the constant and invariable
 ‘ voice of the law, but the erring instability of arbitrary interpositions.’ Beccaria on Crimes, p. 15.

THAT

THAT the principles of our jurisprudence limit a jury to this point, and will not admit the wild and capricious mode of decision on which we have remarked, will best appear from a consideration of the properties which the law requires of a jurymen, and the powers with which it invests him.

It is not within the compass of our present design, to enter at large into the nature of those challenges by which persons are excluded, or those causes of exemption by which they are excused from sitting on juries. It will be sufficient for my purpose to affirm, that no man is excluded for incompetent knowledge of the law; but that, on the contrary, the profession of that science is allowed to excuse a man's attendance²³. But of those who are admitted to be sworn on juries, the law re-

²³ Stat. 7 W. & M.

quire certain qualifications, a few of which we shall specify, to shew that a knowledge of the law is not an essential ingredient.

First, It requires that the jury be summoned from the *visne*, or neighbourhood where the fact in issue happened. It is not necessary to inform the reader, that in the reign of Edward the Third, six hundredors at least must be on the jury²⁴; that in Henry the Sixth's time, the number was reduced to four, and afterwards²⁵ to two: but that at this day the *visne* is extended to the whole body of the county²⁶. The spirit, however, of the old institution still appears, even in the last extension of the *visne*, since it depends entirely on the fiction of the old rule, and

²⁴ Gilb. Hist. Com. Pl. p. 68.

²⁵ Stat. Eliz. 27. cap. 6.

²⁶ By Stat. 4 & 5 Anne, cap. 16, and 24 Geo. II. cap. 18.

supposes the people of the same county more conversant with each others characters and concerns, by their frequent meetings and intermixture, than the inhabitants of different counties. *Vicini vicinorum facta præsumentur scire*, was the maxim upon which the rule was grounded.

Thus the juryman's qualifications were all as local as the objects of his cognizance. The judge himself, sent as the oracle by which the law was to pronounce its decision, was kept out of the reach of undue influence by the statutes 4 Edw. III. cap. 2.—8 Rich. II. cap. 2.—and 33 Hen. VIII. cap. 24.—which provide that no judge of assize shall hold pleas in any county in which he was born or inhabits. His station, together with this precaution, which secured his jurisdiction from the suspicion of partiality, as his learning and dignity did from contempt, rendered all objection to the person of the judge in a great

a great measure unnecessary ; whilst the power which either party has of requiring him to sign a bill of exceptions, if he misstate the law, is of itself a sufficient curb on any bias or prejudice which he might harbour, and a preventive of the future exercise of it, as the same judge who signs a bill of exceptions scarcely ever presides at the second trial of the same cause. —

- From these reasons it is hard if a jury cannot be obtained almost in every instance, which shall be *omni exceptione majores*, and capable of deciding, as infallibly as human frailty will allow, on the truth of the issue which they are to try ; while the judges, strangers, and unconnected in the counties where they administer justice, and varied and shifted at every assizes, restrained besides, as we have seen, from misinterpreting that rule which it is their province *dicere non dare*, ‘ are sworn to the same laws, have had the same education, have pursued the same studies, converse

' converse and consult together, commu-
 ' nicate their decisions and resolutions,
 ' and preside in those courts which are
 ' mutually connected, and their judge-
 ' ments blended together, as they are in-
 ' terchangeably courts of appeal to one
 ' another. Hence their administration of
 ' justice and conduct of trials are conso-
 ' nant and uniform, whereby that confu-
 ' sion and contrariety are avoided, which
 ' would naturally arise from a variety of
 ' uncommunicating jurisdictions²⁷.'

BUT let us reverse this picture, and
 erect a juridical tribunal in every jury. Let
 us reduce the province of a judge to the
 limited jurisdiction of a passive president,
 without any obligation to state the law,
 or power to decide according to it; and
 let us then ask, where and how we are to
 expect this uniformity and consistency,

²⁷ Black. Com. Book III. p. 356.

which are so much the boast of our laws? Let us ask upon what principle we shall expect decisions, correct and upright, from such an indefinite number of interpreters; When the learned and laborious reporter of our legal decisions is to hand down the authoritative *dictum* of a Michael Rayner, and a James Stephens, in exclusion of the inefficacious judgement of a Holt, a Hale, or a Mansfield, and the bulk and complication of our judgements, already too much the object of animadversion, be increased tenfold?

It will, perhaps, be said, that I go too far in stating those as the consequences of making jurors competent to the decision of the law as well as the fact: but let me ask, if a jury be of themselves sufficiently able to determine the law, where will exist the necessity of a judge? 'Not to direct them in matters of fact,' since of those they are the only judges — 'Not in
 ' point

‘point of law,’ if of those every juryman is also competent. To what purpose, then, does this deluded nation pay its judges near forty thousand pounds a year, when it so evidently appears that they are of no use?

BUT, secondly, The jury are bound by their oaths to give a true verdict according to evidence, and this verdict is the answer given to the court concerning the truth of the matter of fact which the jurors are to try²⁸: ‘For,’ says Finch, ‘a jury shall not be charged with matter in law, neither shall it be given to them in evidence²⁹.’ *Duodecim viri damnant vel absolvunt, sed non judicant, vel, ut nos dicimus, penes eos est facti probatio, vel improbatio, vel, in causa omni, quo ad factum decernunt, et ex eorum judicio, quod*

²⁸ I. Instit. p. 226.

²⁹ Finche's Law, p. 399.

veredictum dicimus, judex vel judices sententiam suam proferunt et de jure pronuntiant.^{30.}

It is certainly not only the duty of the jury to decide upon the truth of the facts according to the evidence, but also, whenever they give a general verdict, to find the conclusion of law arising upon those facts, as it is delivered to them by the judge. That this is the case I am led to conclude from the following considerations:

FIRST, Juries are never called upon, but to determine a question of fact; for it is settled, that where the parties agree in their facts, the cause can never go to a jury, but is determined by the court upon a demurrer^{31.}

^{30.} Hickes Ling. Sept. Vet. Kes. dis. ep. p. 40.

^{31.} I. Instit. p. 71. b.

SECONDLY,

SECONDLY, That in the investigation even of simple facts, the interposition of a jury is requisite only where they are dubious ; for if either the principal question of fact in a cause, or point arising collaterally out of it, be evidently the object of the senses, a jury is never summoned to determine it, but the judges, upon the testimony of their own senses, shall decide the point in issue. If, for instance, a jury should determine that a man was an idiot, *a nativitate*, which is certainly a mere question of fact, but obviously an object of sense, and the person so found should, on his appearance in Chancery, and his consequent inspection, be found not to be so, the verdict of the jury, and all the proceeding thereon, would instantly be void and of no effect³².

THIRDLY, Even when an issue of fact is joined, and comes before a jury, either

³² 9 Rep. p. 30, 31.

party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may draw the cause from the cognizance of the jury; for in that case the law is reserved for the decision of the court, and the jury is either discharged, or, at the utmost, only ascertains the damages conditionally ³³.

HERE we see, though the jury have gotten hold of a cause, in which, as we are told, they would be competent to judge of the law as well as the facts, if those facts had continued to be controverted, yet the moment they are ascertained, without the jury's interposition, the omnipotence of that tribunal vanishes. Can any thing more strongly prove, that the law is not, even incidentally, an object of their cognizance? 'Jurors,' it is said, 'are judges

³³ Co. Lit. p. 72. a. Bull. Nisi Pri. III. Ed. p. 313. Cro. Car. p. 143.

‘ of the law as well as the fact.’ I ask, then, why do they not pronounce the law the moment the fact is proved ? Is it the *mode* of proof which constitutes so wide a difference ? And is that the only reason, why those, who are capable of including the law and fact on a verdict, on a question disputed by the witnesses of the adverse parties, in which much judgement is requisite to eviscerate the truth, are yet so perfectly incapable to hint at the law in the so much easier case, where those facts are universally allowed ; where they have no doubts to reconcile, no contradictions to reject ?

✓ **FOURTHLY,** Where the plaintiff’s cause of action is confessed by the defendant’s plea, and they yet go to issue, and a verdict is found for the defendant, the verdict will be set aside, and an inquiry awarded to assess damages³⁴.

³⁴ 2 Strange, p. 873.

FIFTHLY,

FIFTHLY, If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges, who have a right to controul the verdict, and declare the law as they conceive it to be ³⁵.

SIXTHLY, A jury is supposed to be so inadequate to the finding out of the law, that it is an indispenfable duty of the judge who presides at the trial, to inform them what the law is; and as a check upon him in the discharge of this duty, either party may, under the statute of Westminster the Second ³⁶, make his exception to the judge's direction, and enforce its being made a part of the record, so as afterwards to found a writ of error on it ³⁷. Now, if

³⁵ Staund, f. Pl. Cor. p. 165, a. 4 Co. p. 42, b. Hal. Hist. Pl. Cor. vol. I. p. 471, 476. 2. 302. 10 Rep. p. 56. Co. Lit. p. 22.

³⁶ Cap. 31.

³⁷ 2 Inst. p. 426. Burrow, p. 3, 1742. Trials per Pais, 8th edit. p. 222, 466. Case of Fabrigas and Mostyn, p. 11, St. Tr.

the determination of the law, upon their own knowledge, could, in any instance, be supposed an object of the jury's cognizance, where, in the name of common sense, should we find a reason for this mode of proceeding? Surely the only cause that can be assigned for it, is, that the jury are bound to follow the direction of the judge in matters of law; that he in his turn is bound to direct them according to law, which if he neglect to do, or pervert his knowledge to mislead them, the injured party is thus empowered to appeal from an *opinion*, as those call it who will allow none other than the jury to *decide*, which is unnecessary and inconclusive. The very obvious absurdity which this carries on the face of it, ought, one would think, sufficiently to point out the limits of a juror's power.

H SEVENTHLY,

SEVENTHLY, If the jury will find a general verdict, which they undoubtedly may do as often as they please, and that verdict be contrary to law, they subject themselves to the punishment of attain, *unless their finding has been by the judge's direction*³⁸. If it be objected, that attainments in civil cases are exploded in practice, we shall answer, that the power of granting new trials, though neither so sanguinary nor so circuitous, is quite as efficacious; and although, in criminal cases, attainments were never in use, nor new trials granted, where the prisoner was *acquitted* illegally³⁹, it was purely because the law will not allow a man's life to be brought in jeopardy twice for the same offence, as in many instances, where the jury have found the prisoner *guilty* contrary to evidence, the Court of King's Bench hath merciful-

³⁸ 1 Lord Raymond, p. 470. Cro. Eliz. p. 309.

³⁹ 2 Hawk. Pl. Cor. p. 442.

ly set aside the verdict, and granted a new trial⁴⁰.

It may be worth while here to observe, how very strongly those two cases point out the controlling power which our constitution has vested in the judges. We need not enlarge on the obvious reason of a bill of exceptions, and the absurdity of such a measure, if every juryman might chuse how far he would follow a guide who had no authority to lead him. In the rules by which an attainr is directed, we perceive the same spirit in the protection which the jury find under the shelter of the judge's direction. But,

EIGHTHLY, As a jury may as often as they think fit find a general verdict at their peril⁴¹, so they are indulged, in weighty

⁴⁰ Ley. 9. T. Jones, p. 163. 10 St. Tr. p. 416,

⁴¹ 4 Co. p. 53.

and dangerous cases, with a power to find a special verdict, that is, to find the particular facts, and, declining to find the conclusion of law upon those facts, refer that to the court whence the issue comes⁴².

I AM well aware that this power will be, as it has been, much relied on, to prove that a jury may find the law whenever they please upon their own knowledge, because they are thus excused from adopting the judge's conclusion, when they are delicate or dubious: but that this indulgence does not prove quite so much, seems pretty evident. When a judge is giving his charge to a jury, suppose on a trial for murder, his language never is, 'If ye believe such and such doctrines to be true, ye ought to find so and so:' his language is, or, at least, according to the opinion of the twelve judges, it ought to

⁴² Lord Raym. 1494. Staund. Pl. Cor. p. 165. a.

be⁴³, ' If ye believe such and such wit-
 ' nesses, who have sworn such and such
 ' facts, the killing the deceased was with
 ' malice prepenſe, and then ye ought to
 ' find the priſoner guilty of murder; but if
 ' ye do not believe thoſe witneſſes, then ye
 ' ought to find him guilty of manſlaughter
 ' only : ' and ſo, according to the nature
 of the caſe, ' If ye believe ſuch and ſuch
 ' facts, the act was deliberate, or was not
 ' deliberate, and then ye ought to find ſo
 ' and ſo.' And the jury may upon this
 direction give a general verdict, that the
 priſoner is guilty or not guilty of murder
 or manſlaughter; or, if they have any
 doubt that thoſe facts come under the
 judge's definition, they find the facts ſpe-
 cially, and the court, upon that finding,
 judges whether there were malice or
 not; but if the jury on this ſpecial find-
 ing, agree that the facts are as the court

⁴³ 2 Lord Raym. 1494.

states them, to make it murder, and conclude, & *sic per infortunium*⁴⁴, or *se defendendo*, their conclusion shall be rejected, and the law will take its course⁴⁵.

ALL, then, that the advocates for the supremacy of juries can say upon this is, that a jury are competent, and uncontrollable judges of the law, while they remain in their retirement; that they may put whatever construction of law they please upon the facts brought in evidence before them, in opposition to the direction of the court; while, on the other hand, they are forced to confess, that in doing this, if, as it will sometimes happen, they decide contrary to the determination of the court, it is upon a supposition that the evidence appeared to them in a different light from that in which the court viewed it; since, if they

⁴⁴ Hall. Pl. Cor. i. 471.

⁴⁵ 44 E. III. Coron. 94.

will allow the evidence to be as it is stated, they must find the law as it is explained by the judges; that they, who in their chamber were the great depositaries of the law, superior to the inefficient opinion of the judge, in a science in which they are intuitively skilled, are, the moment they return into court, disarmed of all this transcendent power, and subjected to the authoritative control of known and settled maxims. It is the misfortune, it must be confessed, of our jurisprudence, that our common law does not, any more than our equity, come under the censure of an ingenious and respectable writer⁴⁶, who will fain have the latter to be regulated according to the conscience of the Chancellor, and represents it to be larger or narrower as that is, thinking it the same, as if they would make the standard of measure a Chancellor's foot. How would

⁴⁶ Mr. Selden. Table Talk, little Equity.

he exclaims at the modern doctrine, which would erect in the breast of every individual a tribunal of law and equity !

On the privilege of finding a special verdict, no reasonable man can ever wish to deprive a jury ; that they possess it, every friend to order ought to exult : for, when we hear a judge on the bench declaring that he is incapable of deciding what the law is, upon a question not of the greatest intricacy, we should be in a miserable situation, indeed, if a jury were forced to determine it, in questions of much greater nicety and complication. Besides, it may have, and has had, its use, that a jury should be perfectly at liberty to give a special verdict, and thereby throw the odium of an unjust decision, if such were the object of a judge, upon himself. *Humanum est errare.* A man, by being raised to the bench, is not thereby placed out of the general rule ; and the most upright cannot

cannot say, how far a very pure heart may be led to swerve from the path of rigid virtue, and a very penetrating understanding be warped from the close investigation of truth, by any of those numberless affections that hourly, and almost imperceptibly, assail us. At this day, indeed, the judges of England are as much out of the reach of those prejudices, by which men are most powerfully driven or attracted, as human wisdom can place them. Secure and independent in their offices, *quamdiu se bene gesserint*, they have nothing to fear from the most arbitrary prince, or the most flagitious minister. Rather opulent, even in their salaries, setting aside their private fortunes, they are above the sordid temptation of making the wealth of a party any consideration in their judgments: but, above all, the censure of their fellows, and the reversal of their determination by the superior courts, to which, from every inferior one, up to the

King's Bench, and Chancery inclusive, there lie appeals, and the ignominy that must attend a public and notorious partiality, will carry considerable weight in deciding every man, of even a moderate sense of shame and honour, to an upright and impartial judgement. If, notwithstanding all this, it may possibly happen, that a judge shall be influenced by sinister motives, it will certainly be a happy circumstance, that a jury shall not be forced to become the obnoxious instruments of his vicious intentions. But it cannot be inferred from this, that a jury ought to take upon them to determine directly against the decision of the judge in a point of law; since, if it be flagrantly partial, a bill of exceptions affords an ample remedy by writ of error; and if it be erroneous, a new trial may be had merely on motion: but chiefly, because of the evil that must result from so discordant and deformed a mode of jurisdiction.

ALL,

ALL, then, that results from the doctrine of special verdicts is this, that a jury may, when they please, decline to adopt the judge's decision; not that they may, in any case, form a contrary decision, and so overturn every maxim of law on which we depend for the preservation of our lives and properties. A bad law, well observed, is better than no law. *Misera est servitus ubi jus est vagum aut incognitum.* To render our law thus vague and uncertain, is, indeed, the evident tendency of those sentiments, which we have combated, and seen to be most inconsistent with the spirit of our constitution, and the nature of juries. How far the propositions we have advanced are consonant to reason, it may now be worth while to examine.

‘ In almost every art, commercial and
 ‘ mechanical, apprenticeships are held ne-
 ‘ cessary. A long course of reading must
 ‘ form the divine, the physician, and the

‘tical lawyer’⁴⁷. And which of us in a disease will see his next neighbour for a prescription, or make a conveyance, or marriage settlement, according to the opinion of the first, *probus et legalis homo*, he meets? None but those who contend so warmly for the unlimited jurisdiction of jurors; and even they would be puzzled to assign a reason, why he who is a competent judge of the legality of an act when done, should not be as capable of forming the same judgement upon a case submitted to his opinion. Or will it be said, that it is reasonable to suppose, that he who has never studied the law, its principles, or practice, and is called upon once in his life, perhaps⁴⁸, to sit in judgement on the life, or property, of his fellow, shall, by the all-powerful magic of his oath, be so

⁴⁷ Black. Com.

⁴⁸ De Lolme Const. p. 180.

instanti,

instanti, indued with a perfectly competent knowledge of its rules and decisions.

It may, with a greater appearance of reason, be asked, why, if there be so much mystery in law, the most illiterate among us will not be permitted to plead ignorance of any one of those numerous statutes and reports which crowd a lawyer's library? The reason of all laws requires this rigorous enforcement of the rules which are prescribed to our actions. The end of the laws is obedience : but who will obey them farther than it shall please himself, if every man be allowed to plead an ignorance, almost impossible to be disproved? As to the defective mode of their promulgation, we do not undertake to defend it. It seems, on the contrary, to be one of those ills which calls loudly for redress. But let the mode of promulgation be what it may, it can never justify the setting of every individual above those ministers,
who

who are bound strictly by their oaths to decide according to them, not at discretion, but adhering so strictly to the letter of the law, that, 'however criminal a case may be, if it be not found to be positively comprehended in some one of those cases provided for by law, no extensive construction can be admitted'.⁴⁹ It had been well if those who enforce this very doctrine had considered a little more seriously, before they attempted to set a jury so totally above this scanty limitation of power, and to prove that they are to administer laws, to which their members have not been sworn; in doing which, they are to leave all restriction of rule to the sophisticated jargon of the lawyers, and soar into the unlimitable region of opinion.

THERE is another reason advanced in support of this doctrine, with a greater appearance of plausibility. 'We are told,'

⁴⁹ De Lolme.

says

says a writer, already quoted, 'that neither common nor special juries are competent to the decision of what is, or is not, a libel. But grand juries, it seems, possess more sagacity. They must certainly possess some knowledge on the subject, for it is allowed that they have a right to find bills of indictment against libellers. Now a plain man may be puzzled to discover, how it should happen that a grand jury at Wrexham should be so learned in the law of libels, and that a special jury at Shrewsbury, who tried the same cause, and were men of the same rank, should be so incompetent, as they were informed to be, to determine the innocence or criminality of the publication.'⁵⁰

I shall beg leave to observe, that the case is exactly similar in every criminal prosecution at the suit of the crown. A

man cannot be brought to trial for murder, rape, robbery, except by appeal, until a grand jury have presented him 'as under the spot of delinquency'⁵¹, and meet 'to be considered as under the suspicion of the law.' 'But,' as a modern writer expresses it, 'this finding of an indictment is only in the nature of an inquiry, or accusation, which is afterwards to be tried, and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call the party to answer it'⁵². In fact, the finding of an indictment is nothing more than a preparatory investigation of the credibility of the witnesses, the apparent grounds of suspicion, and the necessity of farther trial. The case of a coroner's inquest would have made just as much to the purpose.

⁵¹ Bacon on Government, part i. page 57.

⁵² Black. Com. book iv. page 300.

It has been objected, that 'judges appointed by the King may have an improper bias on their minds in causes between the crown and the subject, is a very *ancient* and a very *rational* idea⁵³.' Certainly, when the judges held their places by the precarious tenure of the prince's will, it was natural for corrupt men to accommodate their decisions to his wishes. And instances enow occur, to shew, that when kings had the power, they generally used it, to remove any judge who would dare to oppose their mandates, or assert the liberties of the people, in opposition to *jure divino* prerogative. But these times are happily past. The commissions of the judges are *quamdiu se bene gesserint*⁵⁴; notwithstanding any demise of the crown⁵⁵. They cannot be deprived of

⁵³ Towers' Observations, p. 6.

⁵⁴ 13 W. and M. cap. 2.

⁵⁵ 1 Geo. III. cap. 23.

their employment, but on the application of both houses of Parliament; so that, at this day, the effect of interest with the sovereign, or those who approach his person, can scarcely influence their decisions^{s6}. Perhaps we may have lived to see the prerogative of the prince very zealously contested by the very judge whom he exalted to the bench. If this be the case, in causes immediately affecting the crown, how much less *rational* is this *ancient* idea, in causes between subject and subject; which, one would think, might have merited an exception to the hypothesis, which it has been endeavoured to establish as a general and invariable rule, in all cases, civil and criminal.

It is farther objected, that, 'it has, therefore, ever been thought a great advantage, that in *such* cases the subject

^{s6} De Lolme, *Const.* p. 101.

' should

should be protected from any undue influence in the mind of a judge, by the interposition of a jury.²¹ Here, indeed, is a distant idea, that the advantage would not be so great in civil causes. It is, undoubtedly, one of the most transcendent privileges enjoyed by an English subject, that, in criminal cases, which, except appeals, are all at the suit of the crown, the proof of a man's guilt, if he deny it, must be obvious to twelve honest and indifferent men, before the sentence of the law can be pronounced against him.

I now proceed to the last object of my consideration, the constant practice of the courts of justice. And I would here observe, in answer to those who represent this practice as a constant infringement on our liberties, that we have no other source from which we can at this day derive our

²¹ Towers' Observ.

knowledge of the common law, whose monuments and evidences are contained; not like the customs of Spain, Portugal; or Sweden, which have been respectively collected and digested into codes by their princes, but chiefly, in the records of the several courts of justice, and in books of reports, and judicial decisions. It might, for the present, perhaps, be a desirable, as well as advantageous, improvement, if the legislature would follow the example of foreign nations, and make a collection of all the rules and maxims of our common law into one connected body. But still, no rules could possibly be laid down so as to comprehend all possible cases. A latitude for interpretation must be left at last; and, after a few ages, our descendants would be involved in as much intricacy as we are at present. The perplexities of the subject would be as great, the difficulties of the student as many. So that, on the whole, it may appear as eligible, to
 leave

leave an old, uncouth, but solid, fabric of jurisprudence, as to raise an edifice in its stead, more uniform, indeed, and more beautiful, but, in all human likelihood, neither so perfect, nor so durable.

It has, however, been urged, in derogation of reports, and precedents, and judicial decisions, that wherever the latter tend to increase the jurisdiction of the courts, they ought not to be attended to. ‘ When a judge takes upon him to ascertain the limits of his power, he becomes *judex in sua propria causa*, which is contrary to the spirit of the English law^{s8}.’ Where else shall we seek the boundaries, by which the authority of the different courts is restrained, but in the solemn adjudication of the superior courts of justice? If I claim, by prescription, a way through my neighbour’s field, I can prove my right only by

^{s8} Towers’ Observ.

evidence, that my ancestors have exercised the same right time immemorial⁵⁹. And this evidence shall be sufficient to establish my title, because it is the very best that can be adduced.

I shall be excused, therefore, for recurring to the best evidence that is to be found of the practice of our ancestors; to those 'solemn reporters,' who are such a stumbling block in the way of modern Utopians; and I shall confine myself to those cases only, where the power of juries to determine questions of law on their own knowledge has been directly controverted or considered.

IN Townshend's case⁶⁰, the jury, after finding some special matters of fact, found, also, as a conclusion of law thereon, that

⁵⁹ Co. Lit. p. 113.

⁶⁰ Plowd. Com. iii.

they worked a remitter : but the court rejected the conclusion, ' for that the office of twelve men was only to inquire of facts, and not to adjudge the law.'

IN the case of Tasker and Salter⁶¹, which was an action of trespass of battery, the defendant justified as tenant by copy of a certain tenement, into which the plaintiff entered ; upon which the defendant *inolliter manus imposuit*, and the plaintiff replied with a similar allegation. Upon issue joined, there was a verdict for the latter : but the court would not allow that the jury could possibly make that good, which the court sees not to be law ; for that of this it is the office of the court, and not the jury, to judge.

IN the case of Malye and Shepherd⁶², the defendant, on action of debt, pleaded,

⁶¹ Hobart, p. 112, 113.

⁶² Palmer, p. 286.

non est factum Edwardi, and the jury, upon issue joined, found it to be the deed of Edmund ; and judgement was by the three justices entered, *quod querens nihil capiat per billam*, because the finding of the jury was contrary to the record *seil*, that Edward was named in the obligation, and not Edmund, ‘ and the jury could not ‘ conclude the court in a point of law.’

In the case of Humbleton and Bucke⁶³, it was agreed, that if a verdict finds matter repugnant, or a thing which cannot come in question, it shall not bind the court.

In an anonymous case, reported by Style⁶⁴, an action was brought against one for digging a hole in a public way, whereby the plaintiff’s horse fell and hurt

⁶³ Hetley, Rep. p. 4.

⁶⁴ Style, Rep. p. 335.

himself.

himself. On issue joined, the fact of the injury was proved ; but without evidence of the person by whom the hole was digged, or that it was a public way ; both of which points were essential to the issue ; and the verdict was quashed, because the jury found what was not proved by the evidence.

IN the case of Vidian and Fletcher^{6s}, an infant, who had joined in levying a fine, was, on her appearance in court, adjudged within age ; whereupon a *scire facias* issued out to the *teretenants*, who came in and pleaded, that she was of full age at the time of the fine levied : upon which plea, issue was joined, and a trial being had at the assizes, there was a verdict for the defendant ; but when she came to pray for judgment, the court answered, that they, and not the jury, were to judge of the infan-

^{6s} Style, Rep. p. 472.

cy, and that, therefore, the latter had not proceeded duly.]

IN Hood's case⁶⁶, it was resolved by the court, that upon the facts proved and found, the court determined whether there were malice; and that, therefore, in the question of murder, or manslaughter, the jury should find the legal conclusion according to the direction of the court,

IN the case of Jones and Bodinner⁶⁷, which was an action of trespass, the defendant pleaded in bar, and the plaintiff replied; upon which they went to issue, and the plaintiff had a verdict: but it was moved, in arrest of judgement, that the issue was immaterial to the action, because the defendants had, by their plea, confessed the trespass; wherefore the

⁶⁶ Kelyng, p. 50.

⁶⁷ Carthew, p. 379.

plaintiff ought to have demurred, and not to have taken an issue to no purpose. And this reason was allowed by the court, who set aside the verdict, and ordered a new writ of inquiry to ascertain the damages. And judgement was entered for the plaintiff upon the confession, and not the verdict.

THE case of Lacey and Reynolds had been before determined in the same manner, and upon the same principle⁶⁸.

IN the case of the King against Oneby⁶⁹ for murder, it was agreed on solemn argument by the twelve judges, that in an indictment for murder, the court, and not the jury, are judges of the malice ; that though the fact, that is, whether the allegations offered to justify, excuse, or al-

⁶⁸ Cro. Eliz. p. 214.

⁶⁹ 2 Lord Raym. 1493.

leviate the act, be true, is the province of the jury ; yet, whether, upon a supposition of the truth of those facts, such homicide is excused, alleviated, or justified, must be submitted to the judgement of the court ;
 ‘ for the construction which the law puts
 ‘ upon facts stated and agreed, or found by
 ‘ a jury, is, in this, as in all other cases,
 ‘ undoubtedly the proper province of the
 ‘ court ⁷⁰.’

In the case of Brome and Rice, which was similar to that of Jones and Bodinner, the court made a like determination ⁷¹.

In the case of the King against Symmons ⁷², the verdict was taken contrary to the meaning of the jury, and the direction of the judge in a point of law ; and the

⁷⁰ Foster's Crown Law, p. 255.

⁷¹ 2 Strange, p. 873.

⁷² Willson, vol. i. p. 1, 329.

justices, Denison and Foster, relied on the last circumstance as sufficient cause for granting a new trial. 'The ground,' said they, 'upon which we go is this, that it is a verdict contrary to the direction of the judge in a point of law.'

In the case of Sarah Hazel, now awaiting the judgement of the court of King's Bench, it was held by Lord Mansfield, that if, on a charge of murder, the malice be implied, it is a question of law for the determination of the court.

THE most important case that had been for some time considered, was that of Bushel⁷³. The jury, on the trial of certain persons indicted for an unlawful assembly, acquitted the defendants against full and manifest evidence. Bushel, one

⁷³ Vaughan, Rep. p. 142, 143, 144, 145. 2 Jon. p. 16, 17.

of the jury, was for this offence committed to the Old Bailey, for a fine of forty marks, imposed upon him by the justices of oyer and terminer. He brought his *habere corpus* in the Common Pleas; to which it was returned, that he was committed *causâ quâ supra*; and farther, for that his verdict was against the direction of the court in a matter of law; and upon this return he was discharged, and the return was adjudged insufficient, for not setting forth particularly so much of the evidence, that it might appear that it was full and manifest; and, likewise, that the defendant did know and believe it to be full and manifest; and also, for not shewing what the direction of the court was, and in what manner the defendant found against it. So far, then, upon this case, it appears, that if the evidence had been particularly set forth, and appeared full and manifest; if it were set forth, that the defendant knew and believed it to have been full

full and manifest ; and if it had been shewn what the direction of the court was, and wherein the defendant found against it, the return would have been thought sufficient to justify the fine, and consequent imprisonment. But it was farther resolved, that petit jurors are not, in any case, fineable for giving a verdict against the evidence delivered in court, because a judge cannot be certain that a juror acts corruptly, and the law will allow him to bring in a verdict on the evidence of his own knowledge ; for that the jury are by law the proper judges of the fact, and ought to be free in the judgement of it, without being overruled by the judges, ‘ who, strictly speaking, have no more to do with matter of fact, than the jurors have with the judgement of the law.’ We must recollect, that those are the words of Lord Vaughan, the most strenuous advocate for the rights of juries ; who, in express terms, excludes them from any cognizance

nizance over questions of law, and allows them an independent jurisdiction only in matters of fact.

THIS determination, which, as a single precedent, we may allow to be, on account of its favour to liberty, more conclusive than a number of precedents which stand in opposition to it, affects only petit juries in criminal cases, and ought not, therefore, to be adduced as an argument for what is directly contrary to the law laid down in it; that juries are, in civil cases, not only equally free, but perfectly at liberty to construe the law as well as the fact, according to their opinion, directly in the teeth of the judge's decision.

SEC.

SECTION THE SECOND.

THE general consequences which naturally result from what we have advanced, are,

First, That a jury have no original cognizance of the law ;

Secondly, That they have no incidental power over it ;

Thirdly, That, therefore, in all cases in which they bring in a general verdict, apparently contradictory to the direction of the court in a point of law, the only cloak which they have for their conduct, is in the supposition, that they have seen the evidence in a different light since otherwise they must acknowledge, either that they have intruded on the province of a jurisdiction, with which they have no

M

right

right to interfere, and ventured, at the hazard of their oaths, to determine a matter of which they can have no legal conviction except from the judge, or that they have wilfully incurred all the guilt, though they may escape the punishment, of perjury.

It remains now to examine how far the case of libel is affected by these conclusions.

THERE is not in all our law books a title, the examination of which will afford less satisfaction than that of libel. When we reflect on the licentiousness to which the press has, generally speaking, arrived in this country; when we turn over the heaps of weekly, and daily, I had almost said hourly, publications, which are calculated for no other purpose than to malign and calumniate the greatest characters among us, we are at a loss to account

count why, in a country whose boast is the indiscriminate impartiality of its laws, whilst the greatest subject dares not to violate the civil rights of the meanest, yet the latter shall, unmolestedly, asperse the honour and reputation of the former.

If the bold and restless offer violence to my person, I can see and avert the stroke : but, against the dagger of the assassin, or the poison of the treacherous, no foresight can save, no bravery nor strength can defend me. It is, then, a necessary regulation, that if I am obliged, on the one hand, to bear the momentary venom of malice and falsehood, I shall, on the other, have the power of appealing to the laws of my country for redress ; and that the wanton assailant of my fame shall be compelled to make me ample amends, if any amends can be ample for the injury. But this regards only the strict rules of retributive justice. The offence against order and decency ;

gency; the evident tendency which every false and malicious libel has to a breach of the peace, (since nothing is more likely to work up the passions beyond all restraint, and drive a man into the greatest excesses, than a wanton aspersions of his character) demand that every person, who disseminates false and malicious reports of another, should answer to the state for the insult and injury offered to the community.

THE common law of England, therefore, wisely provided, that every person who *falsely, scandalously, and maliciously*, libelled another, should be subject to a civil action, at the suit of the party libelled, for the private injury, and to an indictment, at the suit of the crown, for the public offence⁷⁴. It seems, however, by the common law, that the libeller was al-

lowed in both cases to justify himself, by proving the truth of the thing charged to be libellous. It is certain, that in a civil action, no damages were ever assessed for a libel, proved to be true ; and that the same rule took place in criminal prosecutions may be inferred from the following case, in the eighteenth of Edward the Third⁷⁵. John de Northampton wrote a letter to Robert de Ferrers, one of the King's council, in which he scandalized Sir William Scott, the chief justice, and his fellows, the judges ; and upon his confession of the letter, they passed judgement upon him as follows : ‘ *Et, quia prædictus Johannes cognovit dictam literam, per se scrip-*

⁷⁵ It is worth while here to observe, how confidently it has been asserted⁷⁶, that at common law there was no remedy but a civil action for a libel, until Richard the Second's time. The instance which we have quoted, by no means the earliest, was under Richard's grandfather, and thirty-two years before the commencement of his reign.

⁷⁶ Towers' Observ. p. 632.

‘ tam, Roberto de Ferrers, qui est de concilio
 ‘ regis, quæ litera continet in se nullam veri-
 ‘ tatem, prætextu cuius, Dominus Rex erga
 ‘ curiam, justiciarios suos hic in casu, habere
 ‘ posset indignationem, quod esset in scanda-
 ‘ lum justiciarorum et curiæ. Ideo, dictus
 ‘ Johannes committitur ad marese: et postea
 ‘ invenit sex manu captos pro bono gestu.’

If we recollect the time at which this
 entry was made, when none of the law
 proceedings had arrived at that degree of
 verbose exactness to which some of them
 have since attained, it will be a most na-
 tural conclusion, that the truth of a libel
 was then considered as a justification, since
 the falsity is placed as the first aggravation
 of the offence. Indeed, long before this,
 in the third year of the reign of Edward
 the First, the statute of Westminster made
 provision for such a case; confining its
 description, however, to the contrivers of
 false

false news and rumours⁷⁷, as we have already seen it was in the time of Alfred, Edgar, and Canute⁷⁸.

IN the distracted and unconstitutional reign of Richard the Second, the prerogative was supported by an abandoned set of judges, and, in return, he passed the statute *de scandalis magnatum*⁷⁹, which subjected the libeller, as well to an action at the suit of the party, to recover damages for the injuries sustained, as to the punishment of imprisonment on the part of the crown, for the peculiar insult offered to its ministers.

NOTWITHSTANDING the means by which this statute was obtained, and the purposes for which it was enacted, it is

⁷⁷ Cap. 34.

⁷⁸ See p. 30.

⁷⁹ Stat. 2 Rich. II. cap. 25.

observable,

observable, that it extends only to the
 ' devisers of false news, and horrible lies
 ' of prelates, dukes, earls, barons, and
 ' other nobles and great men of the
 ' realm; against whom (i. e. the devisers)
 it is enacted, that ' if they contrive, or
 ' tell any false things of prelates, lords,
 ' and others afore said, whereby discord or
 ' slander might rise within the realm, he
 ' who doth the same shall be imprisoned
 ' until he have brought forth him that
 ' did speak the same.' Hence it is evi-
 dent, that let the slander or discord be
 ever so great, which might grow from a
 tale, unless it were a false tale, it could
 not come within the letter or spirit of the
 statute; and upwards of two centuries af-
 ter, this was the interpretation put upon
 it²: but it was left for more refined and
 peaceable times to discover the outrages
 and evils which truth might occasion in

society, and to guard effectually against them, by rendering the truth of a libel an aggravation of the offence.

As there never was an innovation made upon our laws, which so generally concerns every Englishman, as this upon the law of libels, it may be necessary to deduce its history.

THE court of Star Chamber had, at common law, a jurisdiction over all riots, routs, misbehaviour of sheriffs, and other extraordinary offences, against which the usual and ordinary course of the common law did not sufficiently provide⁸¹. In Henry the Seventh's time, it was first modelled by statute⁸², to suit the arbitrary and avaricious temper of that monarch, extending an unlimited arm over the persons and property of the subject.

⁸¹ Camden's Britannia, p. 130. 4 Instit.

⁸² 3 Hen. VII. cap. 1.

In the reign of his successor, we cannot be surpris'd at the increasing jurisdiction of this court, while the parliament, in an act that will reflect eternal disgrace on its memory, gave the sanction of a law to that prince's proclamations.

EDWARD the Sixth did not live long enough to give posterity the advantages of those great and amiable qualities that appeared in him. The sun of his reign shone mildly while it lasted; but it set, before it had acquired sufficient lustre, in a cloud of night, the darkest that overspreads any portion of our annals. Bigoted zeal, exasperated by an opposition the more unpardonable, because it was just, breathed revenge and slaughter against the unfortunate victims of religious phrenzy. ' Mary's reign was a paroxysm of ' religious madness ' : ' but her civil admini-

²³ Stuart's Discourse on the Constit. of England.

nitration made amends, in some measure, for her religious persecution; and the inquisition of the Star Chamber was unheard of, or unheeded, during that of the church.

SHE was succeeded by a princess, whose reign forms one of the most interesting epochs in the English history. While the glory of her country, and the happiness of her people, were exalted to an enviable height above the other nations of Europe, she stretched the prerogative to a higher pitch, than it had ever attained. Her great popularity gave strength and security to her government; and she did not hesitate to enlarge every power, that had been possessed by her ancestors, while she exercised them for the good of her subjects.

JAMES's hand was but ill adapted to wield the scepter of Elizabeth. In his endeavours to exalt the powers of the crown

to an exorbitant height, he brought them into contempt; and cultivating in his son those unworthy sentiments of indefeasible *jure divino* prerogative, which he harboured in himself, they raised and fed a spirit of opposition in the nation, which, bursting with all the violence of political and religious rage on Charles's head, brought that unfortunate monarch to the scaffold.

Among the other instruments of power used by those misguided monarchs, the Star Chamber stood proudly eminent. It continued to be exerted with discretionary severity, and wanted in all the license of power, unrestrained by the regulations of law, or the dictates of justice. It was stretched⁸⁴ to the asserting of all proclamations and orders of state; to the vindicating of illegal commissions and grants of monopolies; holding for honourable

⁸⁴ Clarendon's Hist. Rebel. L. 1. and 3.

‘ that

that which pleased, and for equitable,
 that which profited; and becoming both
 a court of law, to determine civil rights,
 and a court of revenue, to enrich the
 treasury; the council table, by proclamation enjoining to the people that
 which was not enjoined by the laws,
 and prohibiting that which was not prohibited; and the Star Chamber, which
 consisted of the same persons in different
 rooms, censuring the breach and disobedience of those proclamations by very
 great fines and imprisonments.

A FEW instances may be sufficient to give the reader an adequate idea of this court's extraordinary jurisdiction.

SIR Richard Granville, irritated by the ill usage which he had received from the Earl of Suffolk in a lawsuit, probably said of that nobleman, that he was a base lord. He was accused of this libel before the

Star

Star Chamber, and, though the proofs of his having said even thus much were very inconclusive, he was sentenced to pay a fine of eight thousand pounds, half to the Earl, and half to the King⁸⁵.

Lord Darcy's huntsman, when exercising his hounds, perceived that Sir George Markham kept closer to the dogs than he ought, and used that gentleman with such insolence, that he was provoked to strike the fellow with his whip. The huntsman threatened that he would tell his master. Sir George replied, that he would treat the master as he had used the servant, if he should justify such insolence; and for this he was cited before the Star Chamber, and fined ten thousand pounds⁸⁶.

WILLIAM Prynne had written a large book of a thousand pages, called Histrio-

⁸⁵ Lord Lansdown, p. 514.

⁸⁶ Ibid. p. 515.

masstyx, in which he laboured hard to de-
cry stage plays, interludes, and comedies;
music in churches; and all the other enormi-
ties of Christmas keeping, bonfires, and
maypoles, which he attributed to the in-
stigation of the devil; and argued vehe-
mently for the Puritans, insisting, and en-
deavouring to prove, that Jesus Christ was
a Puritan. Unfortunately for Pryane, the
Queen loved stage plays, and sometimes
even acted a part in interludes or pastorals
at court. He was summoned before the
Star Chamber, and sentenced to be put
from the bar, to stand in the pillory at
Westminster and Cheapside, to lose an ear
in each place, and to pay a fine of five
thousand pounds to the King.

WILLIAMS, Bishop of Lincoln, had,
by his good offices with King James, ob-
tained the first promotion of Archbishop

* Rushworth's Collection. 2. 221, 223.

1

Laud :

Laud : but the Archbishop could not remember a debt of gratitude to a man who opposed his religious tenets ; and Williams was fined ten thousand pounds in the Star Chamber, to gratify Laud's vengeance, on very frivolous pretences. To levy the fine, his furniture and books were seized ; and there were found among them two letters from one Osbaldiston, a school-master, to Williams, in which mention was made of *a little great man*, and *a little urchin* : but those words were sufficient to constitute a libel against the Archbishop. Williams was fined eight thousand pounds, and Osbaldiston five thousand ^{ss}.

THE decision *de libellis famosis*, which, though it preceded the above, we have reserved to the last place, as being of most importance, would of itself be sufficient to give us an adequate idea of the system of

^{ss} Rushworth's Collection. 2. 414, &c.

tribunal. Libel, we have seen, was punishable at common law and by statute: but the mode of proceeding at common law, admitted the truth of a libel to be averred in civil and criminal cases alike.

This was the *ordinary* course. The *extraordinary* case, which came under the Star-Chamber cognizance, was that in which the very truth itself constituted the libel; and it was determined as law, 'that it was
'not material whether the libel be true, or
'whether the party against whom it was
'made be of good or bad fame⁸⁹.'

Thus were all the practices and decisions of the court of Star Chamber. No wonder, then, when the seeds of liberty, smothered, as they had been, with the enormous weight of prerogative, had not only shot forth the wholesome fruits of freedom, but generated the exuberancies

⁸⁹ Rushworth's Collection. 29. 560. 125, b.

of licentiousness, and overgrown the rights, as well as the oppressions of sovereignty, that this, with every other engine of tyranny, should be removed. In the sixteenth of Charles the First it was abolished. But as the court of King's Bench inherited all the surviving parts of its jurisdiction, the modern doctrine of libels was introduced into a court of justice. It was alleged to be law in the King's Bench, and the allegation was supported by a reference to a Star-Chamber determination, that on an indictment for libel, its truth could not be admitted as a justification. Our reports, our digests, our abridgements, our commentaries, all adopted the doctrine. 'It is not material,' said Lord Coke in the Star Chamber, 'whether the libel be true or false, or whether the party against whom it is made be of good or bad fame.' Mr. Hawkins, in the King's Bench, improves on the idea. 'It is far from being a justification,' says he, 'of

‘ of a libel, that the contents thereof are
 ‘ true, or that the person upon whom it
 ‘ is made has a bad reputation, since the
 ‘ greater appearance of truth there is in
 ‘ any malicious invective, the more pro-
 ‘ voking it is?’

THIS position involves most absurd, as well as unjust, consequences. Suppose a man convicted of perjury. If A. had unfortunately published this circumstance, whether in defence of his own character against an unjust attack, or in vindication of his conduct towards such a miscreant, or in order to caution the unwary stranger against his base principles and designs, he would be told by the assertors of this absurd doctrine, that the truth of his libel enhanced its criminality, and be sentenced to pay such a fine, and such other corporal punishment, as the judges in their *dis-*

cretion should think fit. Although such enormities are not yet practised, still, according to the position alluded to, they may be daily committed under the sanction of the law. The exercise of any power, however moderate, is a very weak foundation upon which to rest the claim to that power, if it be inimical to justice and liberty. *Malus usus abolendus est.* If it be unsound doctrine, Sir William Blackstone tells us that it may be rejected, against the authority of a precedent⁹¹: if it be not law, it ought not to be allowed.

THE prevention of crimes, and the preservation of the public tranquillity, form the only foundation of the right of any man, or body of men, to punish their fellow creatures; and punishment directed to any other view, or tending to any other end, is tyranny. This

⁹¹ Comment. b. i. p. 71.

right is exercised to its proper purpose, when a perjurer, or a false and malicious libeller, is pillored. The infamy which such a punishment draws upon the culprit's credit and character, is the object for which it is inflicted; that others may be thereby intimidated from the commission of the like offences: for certainly the sitting in the pillory would, of itself, hardly be a sufficient curb on the malevolence of a man, far above the extreme of vice. The punishment consists, then, in the public infamy. But by the modern doctrine, if a person shall proclaim to the world this punishment, which consists in its very notoriety, as the greater appearance of truth increases its provocation, this, which rests upon the indisputable verity of a record, must be more provoking than any other whatsoever. By this same modern doctrine, the judge shall be obliged to tell a libelled plaintiff in a civil suit, ' the truth only has been spoken of you ;
' you

' you deserved it, and if you suffer, it is
 ' *damnum absque injuria*, and you are enti-
 ' tled to no redress ;' and to tell a prose-
 cutor of a criminal accusation, under ex-
 actly similar circumstances, who seeks in a
 vindictive punishment to involve in ruin
 the enemy of his vices, ' we will feed your
 ' revenge ; the laws have been insulted in
 ' the punishment of a malefactor, and the
 ' prisoner shall suffer all the rigour of
 ' their severity.'

Is this consistent with the principles of
 equity ; that the vicious, the prostitute,
 the infamous, though they shall not have
 the same private remedy for an act by
 which, in the eye of the law, they are
 not injured, shall yet have the same power
 of drawing down the vengeance of public
 punishment, that the virtuous and just shall
 possess for the severest injury that can be
 offered to him ? Or is it politic, that the
 historian's pen shall tremble beneath the
 inquisitor's

inquisitor's rod; and vice and virtue, the patriot and the traitor, a Chartres⁹² and a Savile, shall be handed down to posterity, with equal honour, undistinguished by the plaudit of gratitude, or the censure of justice, because, 'though a private man or 'magistrate be dead at the time of making 'the libel, yet it stirs up others of his family and blood to revenge and break the 'peace⁹³.'

THIS, indeed, some ages ago, was a very profitable doctrine to the crown, and might, therefore, be reasonably expected from the court of Star Chamber, or any other court, whose judges were, in general, likely to be exalted for their corrupt subserviency to the will of the prince, and to be continued only as long as they tendered the same implicit obedience to his

⁹² Celebrated by Arbuthnot's epitaph.

⁹³ Hawkins, P. C. 1. 195. 5 Co. 125. a.

mandates,

mandates. It was not very surprising, too, when the fines and amerciaments of the courts of justice formed a considerable part of the crown revenues, that the ministers of the prince were not very delicate of the justice with which they were imposed upon the wealthy and the powerful²⁴.

BUT these causes have long ceased to exist. The prince is endowed with a patrimony sufficient, at least, to preserve him from practising extortion. His judges are no longer the ministers of arbitrary power; they are the independent depositaries of laws, certain, equal, and permanent. Pity that there should exist even one case, which affords an exception to the strictness that guides their judgements!

IN support of this new doctrine it has been alledged, that the terms 'maliciously,

²⁴ Madox Exch. 4to. edit. 1769. vol. i. p. 342.

'falsely,

‘falsely, scandalously,’ are words of course, tantamount to the ‘moved and seduced by’ ‘the instigation of the devil,’ in indictments for murder. But the comparison will not hold. It is a matter of perfect indifference, whether the devil instigated the murder or not ; and, though I do not remember any case in which it has been determined that an indictment shall not be quashed for the want of those words, it may be very fairly assumed, that if the question came to be agitated, they would be judged to be immaterial ; for it has been determined that certain other words, of, at least, equal import, may be omitted without vitiating an indictment. The person murdered is supposed to be in the peace of God, and of the Lord the King, at the time of the murder : but it hath been adjudged that the words are not essential in an indictment for murder, for they are not of the substance ; and, perhaps, the truth was, that the

P

party

party was, at the time, breaking the peace".

IN a trial for a libel, therefore, if the words 'evilly disposed,' which still hold their place in the form, were omitted, and their materiality came in question, we may naturally conclude, that they would be resolved, on the same principle, not to be material.

BUT, in an indictment for murder, the crime is ever laid to have been committed wilfully, and with malice aforethought ; and this malice is so much of the essence of the crime, that no killing can be construed to be a murder without it. It is true, that the court are properly judges of what the law construes to be malice, and are, therefore, on every trial for murder, to explain, as clearly as possible, to

the jury, what the law defines to be malice, and how far the principal case comes under that definition, on the supposition of certain facts, on the truth of which the jury are to decide, and then apply them to the rule which the judge has laid down. No judge, on a trial for murder, ever yet told a jury, that every killing was murder, and that the words, ' wilfully and ' with malice aforethought,' were words of course, which proved themselves on the face of the record.

In an indictment, or information, for a libel, the book is alledged to be ' scandalous, false, and malicious;' and if we reason from analogy, those words will appear exactly parallel to the ' wilfully and ' with malice aforethought' in murder. It is the malicious intention, coupled with the wilful act, that makes the murder. It is the malicious intention, coupled with

the malice and falsity of the book, that can make any publication a libel.

NOTWITHSTANDING this evident correspondence between these cases, the usual language of the judge to the jury in matters of libel has been tantamount to this :

- ‘ It is not your business to inquire of the
- ‘ fact of the truth of the libel, or the fact
- ‘ of the writer’s, or publisher’s intention.
- ‘ It is not my duty to explain to you,
- ‘ what the law defines to be a malicious
- ‘ publication. You have only to find the
- ‘ fact, whether the book which is charged
- ‘ on the prisoner was published by him;
- ‘ and let its contents be true or false, in-
- ‘ nocent or criminal, you must find guilty
- ‘ of maliciously, falsely, and scandalously,
- ‘ publishing a malicious, false, and scan-
- ‘ dalous libel.’

THIS

‘ ‘ Why,’ says Junius, with his usual poignancy,
 ‘ force twelve honest men, in palpable violation of
 ‘ their

THIS doctrine, however, is not uncontroverted. In Lord Say and Sele's case, in an action on the statute *de scandalis magnatum*, it was resolved by the court, that false words and lies were the things prohibited by that statute; and that even the slander and discord were cognizable, only as they were the result of that falsehood, for that they were but the evil consequence, or effect ensuing thereupon.

IN the case of the Queen against Drake⁹⁷, Lord Holt held, that every word in the information or indictment is a mark of description of the very libel itself. But the description of a libel, as a false, scandal-

' their oaths, to pronounce their fellow creature a
' guilty man, if, at the same moment, you forbid
' them to inquire into the only circumstance, which,
' in the eye of the law and of reason, constitutes
' guilt — the malignity or innocence of his intentions ?

⁹⁷ Cro. Car. p. 136.

⁹⁸ Carthew, p. 407.

lous, malicious libel, is an essential part of every information and indictment, and without them, therefore, a libel can neither be described, questioned, nor punished.

In the case of the King against Bear, there is a very strong insinuation that the same doctrine took place. Bear was indicted for a libel on the King and government. Mr. Carthew tells us, that after the introduction and words of aggravation, with respect to the King, as usual in such cases, it was laid, that he (Bear) ‘ *subdole*
‘ *falso et malitiose, composuit scripta et fecit,*
‘ *et componi, scribi, et fieri, causavit ac sibi*
‘ *procuravit, et industrie colligit separales*
‘ *scandalosos, falsos, et seditiosos, libellos, con-*
‘ *tinentes in se de dicto domino rege nunc, et*
‘ *ejus æquâ justâ et clementissimâ governa-*
‘ *tione, quam plurima falsa malitiosa et sedi-*
‘ *tiosa verba, et sententias materias, dictiones*
‘ *et expressiones, (viz.) in uno libello intitu-*
‘ *lato, “ The Belgic Boar, to the tune of*
‘ *“ Chevy*

“Chevy Chace,” *continetur inter alia juxta*
tenorem’ (reciting the words at large in
 English) ‘*quos quidem falsos, et malitiosos,*
et scandalosos libellos,’ &c. and he con-
 cludes, leaving out the words of aggrava-
 tion as before. These words are the same
 which we have noticed before, ‘being
 ‘evilly disposed,’ &c. and these the re-
 porter passes unnoticed, introducing us at
 once to the body and essence of the indict-
 ment; the falsity, malice, sedition, with
 which Bear composed a false, malicious,
 seditious libel.

THERE was another decision in this case,
 which is much more material to our pur-
 pose. It appears to have been decided, that
 the falsehood, malice, and sedition of a
 libel, were (contrary to the malice, felo-
 ny, and sedition of other acts, which are
 defined and punishable by known and li-
 mited rules) in the province of the jury.
 A special verdict was given, in which Bear
 was

was found guilty as to the writing and collecting, and as to all the rest, not guilty; and a motion was made, in arrest of judgement, for that *inter alia* shewed, that there was something else which, perhaps, might, if it appeared, qualify the rest: but it was not allowed, because as Lord Holt and the rest of the court said, if that had been the case, the defendant could not have been found guilty. In the opinion of the court, then, something more was requisite to constitute guilt, than writing a book; and of that something, as well as of the qualifications which should alleviate it, the jury were to judge; for they alone were to find guilty⁹⁹.

IN every indictment for a crime, the offence must be set forth with clearness and precision. In treason, the facts must be laid to be done treasonably, and against

⁹⁹ 2 Salkeld, p. 417.

his allegiance. In indictments for murder, it is necessary to lay the murder to have been committed, 'wilfully, and with 'malice aforethought.' In all indictments for felonies, the act must be laid to be committed 'feloniously;' and a failure in any one of these instances will be fatal, for these terms only can express the very offence.

WHETHER, then, we reason from analogy, or conclude from the general spirit of our laws, in either case it is evident, that an indictment for a libel ought to be governed by the same rules; that it must be laid to have been falsely, scandalously, and maliciously written, because those words are essential to make it a libel.

In all private libels, then, the falsity seems to be justly a principal object of consideration; and if it be, as a matter of fact it can belong only to the jury.

Q

BUT

But in public libels, or libels against the governments, the sedition, which is absolutely necessary to make any writing libellous, belongs, it will be said, to the judge's province; he is to determine what resistance to power shall be lawful, or unlawful, or what circumstances they are in which an open defiance of established authority shall be punishable. That this should belong to the judge, I am not willing to deny, if, on the other hand, it were laid down as a part of his duty, as in every other instance, to instruct the jury what is sedition, that they may be legally authorized to say whether the facts be seditious: but until that is done, it will be the duty of every jurymen to acquire the best knowledge he can of the subject, and attain as perfect a conviction as possible, that the accused hath published a false, scandalous, malicious, and seditious libel, before he finds him guilty.

In answer to all this, it is said¹⁰⁰, that in a criminal prosecution, the tendency which all libels have to create animosities, and disturb the public peace, is the sole consideration of the law; that, therefore, the truth of a libel, so far from being an extenuation, is an aggravation of the offence, because it is more likely to provoke the party to a breach of the peace; that the falsity of it shall not, on the other hand, alleviate its criminality, but rather add to the heinousness of the offence; and consequently, that the malice, falsehood, and sedition, and the malicious, false, and seditious intention, are things, of course, with which the jury have nothing to do; their only business being to find the fact of publication, and the falsehood, malice, &c. prove themselves on the face of the record¹⁰¹. And this *reasonable* position is

¹⁰⁰ Black. Com. book iv. p. 150.

¹⁰¹ State Trials, vol. iii. p. 320.

illustrated by the following wholesome argument: ' If once we come to impeach
 ' the government, by way of argument,
 ' it is the argument that makes the go-
 ' vernment, or not the government; so
 ' that the government ought not to be im-
 ' peached by argument, nor the exercise
 ' thereof shaken by argument. No private
 ' man can, therefore, take upon him to
 ' write concerning the government; for
 ' what hath any private man to do with
 ' government, if his interest be not stirred
 ' or shaken? It is the business of the go-
 ' vernment to manage matters relating to
 ' government; it is the business of the
 ' subjects to mind only their own proper-
 ' ties and concerns¹⁰².'

This, we are to remark, was an *argument* advanced on the trial of the seven bishops: but the judge was not lucky

¹⁰² State Trials, vol. iv. p. 394

enough to foresee, that the period was fast approaching when the voice of nature, that unerring argument, was to overturn his positions; when it proved, that dominion was not an hereditary property, but a trust delegated for the benefit of the governed, and, that when it was prostituted to other purposes, by oppression, imbecility, or wantonness, it should be resumed. James violated every right of his people, civil and religious, and drove forward, with the zeal of a monk, a system which, on the near approach of the impending storm, he was to relinquish 'with the apathy of a stoic, and the timidity of an old woman.' His subjects declared, that James the Second had endeavoured to subvert the constitution, had broken the original contract between king and people, and violated every fundamental principle of the laws; that thereby he had abdicated the throne, which, being become vacant, they filled with the Prince of Orange.

duona

WHILST,

And whilst, then, the Revolution shall
 continue to be recorded in our annals, as
 a wise, just, and necessary measure; whilst
 the present happy establishment shall con-
 tinue to be preserved, and the resolution
 of the Convention Parliament remain un-
 rescinded, the principles of the Revolu-
 tion will continue to be cherished and de-
 fended. The fundamental principle of
 that great event originated in a freedom of
 inquiry into the measures of government;
 unless we will suppose that a people are to
 determine and to punish without convic-
 tion; unless we will suppose an obvious
 contradiction, that the same tribunal which
 has a right to punish, has no right to in-
 vestigate the reason of its decision. But,
 says Judge Blackstone, "whenever a ques-
 tion arises between the society at large,
 and any magistrate vested with powers
 originally delegated by that society, it
 must be decided by the voice of the so-
 ciety

society itself; there is no other tribunal
upon earth to resort to.^{103.}

The privilege, therefore, of canvassing
freely public men and measures, is justly
esteemed the most valuable part of an
Englishman's birthright; and it is a ser-
vice done to the state, to exercise it freely:
but if a man, in doing this, publish
what is improper, mischievous, or ille-
gal, he must take the consequences of
his own temerity.^{104.}

This illegality, impropriety, and mis-
chief, consist in the malicious propagation
of falsehoods, concerning the government,
or any of its magistrates, by which,
groundless distrusts and jealousies are
spread among the people, and divisions fo-
mented between the governors and the

Black. Com. book i. p. 212.

Ibid. book iv. p. 152.

governed.

governed. The criminality of every publication must rest upon this foundation, at least, until we think it a good season to revive the Star-Chamber inquisition, and, with it, the inconsistent, as well as odious, doctrine, that the publication on paper, of a truth already notorious, is a false, scandalous, and malicious aspersion; that it is
 v unlawful for the same freeman, who glories in the power of delegating a representative to make laws for his governance, to inquire into the conduct of his trustee, and enable himself to judge whether or not he deserve a continuance of his confidence; and mischievous, to reveal the conduct of a traitor, and thereby deprive him of the public support, by which alone he could effect the ruin of his country.

HEREIN, then, the difference lies between a public and a private libel; that a private person being accountable only to the laws for his actions, is not the object
 of

of any other man's reproach as long as he leaves him unmolested ; and that, therefore, when violent and abusive scandal shall provoke a man to an actual breach of the peace, human frailty should plead in extenuation of his warmth, though the scandal were strictly true. This, however, will hardly warrant the right of binding over the libeller to his good behaviour. The danger is supposed to rest solely in the rage of the person libelled ; and the moment he dispassionately appeals to the laws, that danger vanishes. It is one of the quibbles which reason never dictated, and she cannot defend, that the same law, which intends it reasonable that I should break the peace, shall not bind me to my good behaviour, but, leaving me at liberty, shall impose the hard restriction upon him whom it is expected I shall attack. Besides all this ; that a notorious perjurer should be placed on a level with an upright citizen ; that a stigmatized

R

cheat

cheat should be as secure and unmolested as an honest dealer, may, indeed, promote the immorality which flourishes so prosperously amongst us, but can hardly tend either to the peace or welfare of society.

Be all this as it may, with respect to private individuals, every minister of state becomes, the moment he enters his office, accountable to the people for his actions. While he serves the crown, immediately, they have an interest in him, and a coercive power over his errors, or his treachery. He should, therefore, have no other resource but in his virtue and integrity; nor be suffered to stifle the voice of truth by the weight of influence, and the severity of punishment.

THE introduction of philosophy into law, has been considered as one of the greatest improvements of which the present age can boast. * This study, former-

' ly dry and unentertaining, founded chief-
 ' ly on authorities, and abounding with
 ' references to statutes and opinions, but
 ' seldom to reason or common sense, and
 ' therefore relinquished to practical law-
 ' yers, is now found to be important and
 ' interesting, by the connection it has with
 ' the general happiness of mankind, and
 ' by establishing peace, order, and secu-
 ' rity in society.' Surely, reason and com-
 mon sense do not, in this case, concur with
 the authority of precedents and opinions,
 to establish for law in a court of criminal
 justice, whose principles ought, above all
 others, to be founded in reason, the un-
 digested and incoherent decisions of a tri-
 bunal, which constantly proved itself the
 willing and effectual instrument of tyran-
 ny. If, however, we still find that those
 exploded decisions are, in derogation of
 the common law, made the rule of mo-
 dern judgements, and that there exists one
 case, the most important in a country of

freemen, in which we shall be judged by a rule, if it deserves the name, which is neither permanent nor uniform, and punished by a measure unlimited and unknown, we have still to rejoice that trial by jury stands between us and the danger of discretionary explication, and discretionary punishment, by men invested with permanent official authority. And it becomes a duty, which cannot be too often inculcated in the mind of every man who is called to sit in judgement on his peer, in a trial for libel, to be fully convinced that he has published a book, malicious, false, and seditious, and that he published with a malicious and seditious intention, before he finds him guilty. While the intention of any publication, its truth or falsehood, its tendency to sedition, are all equally claimed to be regulated by the vague and indefinite *discretion* of a tribunal which is empowered to inflict discretionary punishment, it behoves every juror to assume the

trial

trial of the libel, with all its incidents of intention, malice, sedition, and scandal, as matters of fact as much as the fact of publication.

It has been observed by somebody, that the reign of a good prince may prove a curse to his subjects, in the example which a tyrant may draw from it to exercise the same powers to the worst of purposes, which he did to the best. The prerogative, which in the hand of Elizabeth was a blessing to her people, became their bane in the hands of a James and a Charles. So a decision, founded in justice, and made through necessity, by a Hale, or a Holt, may serve as a pretext to authorise the oppressive inventions of a Scroggs, or a Jeffries; such characters will exist in all ages; and it is our duty not to acquiesce with silent tameness in the legality of precedents, which, though exercised with moderation in our own day, may justify the

the utmost excess of tyranny against our posterity.

It will, however, reflect much honour on jurors, if they act with the same inflexible impartiality in this, as they generally do in every other instance; if, while they reject the discretionary dictum of opinion, on the one hand, they will not shelter licentiousness on the other, but give up the writer of every libel, that shall merit those opprobrious epithets with which they are branded, and appear evidently to have been written with this ill intention, to exemplary punishment.

The liberty of the press is justly considered the palladium of freedom. But there is no true friend to his country, who must not regret the truth, that this liberty is erroneously taken to consist in a power to propagate scandal against individuals, and unjust suspicions of honest magistrates, with

with impunity; and, that it should be thought to be materially endangered, and a stab made at the vitals of our constitution, if an open abettor of rebellion be brought to punishment, or a man be publicly questioned by the administrators of the laws, why he has disseminated unnecessary and dangerous suspicions against the government, and endeavoured to impress upon the minds of an illiterate vulgar, the idea, that the executive power is on the eve of reducing us to slavery, and extorting the money out of our pockets with a fixed bayonet.

WE now see an end of our endeavours to strengthen that line of separation which the constitution has interposed between judges and juries. We shall add, however, one observation more from Lord Hardwicke; an observation containing one of the most essential truths that can be inculcated into the breasts of Englishmen—

himmen — ‘ It is,’ says he, ‘ of the great-
 est importance to the laws of England,
 and to the subject, that the power of
 judges and jurors are kept distinct; that
 the judge determines the law, and the
 jury the fact; and if ever they come to
 be confounded, it will prove the confu-
 sion and destruction of the law of Eng-
 land.’

THE END.

E. J. M.